FINAL STATEMENT OF REASONS

Comments were received regarding several areas of proposed rulemaking described in the Notice of Rulemaking and Initial Statement of Reasons. No comments were received in response to a Notice of Proposed Modifications, but two comments were received concerning the changes described in the Second Notice of Proposed Modifications.

Section 32992, subsection (b)

With respect to proposed revisions to subsection (b), the National Right to Work Legal Defense Foundation, Inc. (NRTW) objected to PERB following what it terms the "Ninth Circuit's ill-advised" ruling in Harik v. California Teachers Association (9th Cir. 2003) 326 F.3d 1042 (Harik). Under Harik, an exception to the general requirement that the calculation of chargeable and nonchargeable expenditures be based on an independent audit was approved for "small" unions. Thus, the amendments to subsection (b) included language providing that "calculation of the chargeable and nonchargeable expenditures may be based on an unaudited financial report if the exclusive representative's annual revenues are less than $50,000 and a nonmember is afforded a procedure sufficiently reliable to ensure that a nonmember can independently verify that the employee organization spent its money as stated in the notice." The Board declined to adopt this objection, noting that Harik has been discussed with approval in its own decisions (see, inter alia, UPTE, CWA Local 9119 (Yaron) (2006) PERB Decision No. 1820-H), and that incorporation of the holding of Harik is consistent with the general objective of conforming PERB's agency fee regulations with current case law.

The NRTW also objected to the deletion from this subsection of language requiring that the independent audit be made available to the nonmember. In this respect, the NRTW relied upon the Ninth Circuit's ruling in Cummings v. Connell (9th Cir. 2003) 316 F.3d 886 (Cummings). On this point, the Board agreed that the originally proposed deletion of the language was inconsistent with current case law. In a Second Notice of Proposed Modifications, revisions to the language of the subsection were proposed that reincorporated the requirement to make the independent audit information available, consistent with the Harik "small union" exception and also consistent with the allowance for a certification by the independent auditor approved by Cummings. In response to the Second Notice of Proposed Modifications, both the California Teachers Association (CTA) and the California Federation of Teachers (CFT) expressed concern that the language could be read to mean that the allocation of expenditures between chargeable and nonchargeable categories must be audited, as opposed to just an audit of the expenditures themselves. CTA and CFT argued such an interpretation would be inconsistent with Cummings and other lead cases in this area. The Board declined to adopt the CTA and CFT objections, noting that the language of the proposed regulation subsection was itself adopted from Cummings and was not subject to the interpretation objected to by CTA and CFT.

Section 32994, subsection (a)

The NRTW objected to the maintenance of language in this subsection requiring a nonmember to exhaust the exclusive representative's appeal procedures before coming to PERB with an

unfair practice charge. The NRTW argued that there is no requirement to exhaust an arbitration procedure prior to bringing a claim in the courts, citing Air Line Pilots Association v. Miller (1998) 523 U.S. 866, 876-877. The Board declined to adopt this objection and remove the exhaustion requirement. In the discussion on this point, it was conceded that the courts have held that a fee payer cannot be required to exhaust an arbitration procedure or other administrative remedies before raising a constitutional claim with the court, but also noted that it is not correct that any court has held likewise concerning an administrative body's policy imposing an exhaustion requirement. Further, PERB regulations do not affect a fee payer's right or opportunity to take their issue to a federal court. The Board noted that the question is whether the Board, as a matter of policy, will defer to the impartial arbitration procedure that the regulations require the exclusive representative to establish. The Board concluded that to require exhaustion in this context is consistent with PERB policy concerning deferral in other types of unfair practice cases, and is a reasonable policy judgment as to how the agency wishes to allocate and expend its resources.

CTA, Service Employees International Union Local 1000 (SEIU), International Union of Operating Engineers Unit 12 (IUOE), Professional Engineers in California Government (PECG) and California Association of Professional Scientists (CAPS) objected to amendments to this subsection that defined an agency fee challenger as merely one who disagrees with the union's determination as to chargeable expenditures, and argued such a person must also have filed a timely challenge. The Board agreed that the language of this subsection needed to be better clarified, and approved modifications to it that also included the requirement that a fee payer must file a timely challenge to be considered an agency fee challenger.

Section 32994, subsection (b)

CTA, SEIU, IUOE, PECG and CAPS each expressed concern that the language of this subsection was potentially confusing. The unions noted that no single official of the exclusive representative has authority to "resolve" agency fee challenges, and thus the requirement that a challenge be filed with "an official" of the union "who has authority to resolve" challenges would be misleading. The Board agreed that this provision needed to be clarified and approved modifications to the language that addressed the comments, specifying that challenges be filed with the official of the union designated in the annual written notice.

Section 32995, subsections (b) and (c)

The NRTW argued that the requirement for an exclusive representative to place funds in dispute in an escrow account "in an independent financial institution" does not conform to the requirements of case law, citing San Ramon Valley Education Association, CTA/NEA (Abbot and Cameron) (1990) PERB Decision No. 802 (San Ramon). Consistent with San Ramon, NTRW argued PERB should require, in subsections (b) and (c), that the escrowed amount be placed "in an independently controlled escrow account, in an independent financial institution." CTA argued that this change was not necessary.

CTA, SEIU and IUOE argued, relying on Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292 (Hudson), that subsection (c) should require only escrow of "agency fee

amounts **reasonably** in dispute." The unions noted that, in Hudson, the Court discussed the fact that there are categories of expense "that no dissenter could reasonably challenge [and thus] there would be no reason to escrow the portion of the nonmember's fees that would be represented by those categories." The NRTW agreed that only amounts "reasonably" in dispute were subject to the escrow requirements.

The Board, relying in part on the holdings of San Ramon, agreed that both changes should be adopted in the final regulations. Thus, subsections (b) and (c) were modified to incorporate the "independently controlled escrow account, in an independent financial institution" language, and subsection (c) was modified to specify that only amounts "reasonably" in dispute are subject to the escrow requirement.

Section 32995, subsection (d)

No changes to this subsection, except to re-designate it as (d) rather than (c), were proposed in the initial rulemaking. SEIU and IUOE argued that the language of the subsection should be amended. They contended that interest paid by exclusive representatives on fees earlier escrowed and then rebated should be at the rate actually earned by the union and not at what they characterized as a "vague and unclear" prevailing rate. The Board declined to take any action on these comments, noting in part that the language objected to has been a part of the regulations since the first adoption of agency fee regulations in the late 1980's and thus the objecting parties had not demonstrated the necessity of a change to this regulation provision. Further, there have been no PERB cases where "prevailing rate" or "interest rate" was at issue concerning agency fee disputes, but there is PERB precedent stemming from other unfair practice issues where the manner in which the "prevailing rate" is established has been discussed. (See The Regents of the University of California (1997) PERB Decision No. 1188-H, and cases cited therein.) The Board also considered that requiring payment of only the rate actually earned could deny to employees the full use and earning power of money due them.

Section 32996

SEIU and IUOE commented that this section, in both its title and text, refers to the term "Agency Fee Appeal Procedure," a term that is no longer found in the regulations as otherwise amended. The references elsewhere in the regulations are revised to reference the "Exclusive Representative's Objection Procedure" (section 32993) or the "Exclusive Representative's Challenge Procedure" (section 32994). The unions submitted proposed language to clarify the requirement set forth in this section. While the Board did not agree to adopt the language proposed by SEIU and IUOE, the Board agreed that the section should be revised. Limiting the regulation by referring only to the "most recent annual notice" was held to be too limiting, as the Board may have cases concerning agency fee disputes from prior years, or cases where the issue concerns the failure of the union to include one or both of the procedures (objection or challenge) in the annual notice. The Board approved modifications to both the title and the text of the section to clarify its meaning.